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IN THE

Supreme Court of the United States

October Term, 1977
No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

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BRIEF OF AMICUS CURIAE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION

INTEREST OF AMICUS CURIAE

The amicus curiae National American Indian Court Judges Association is a voluntary association of judges of Indian courts founded in 1968. Its membership and Board of Directors consist of Indian court judges. Its objective is "to provide for the upgrading of the Indian Court System through research, professional advancement and continuing education," and "to maintain and improve the integrity and capability of the American

Indian Court System in providing equal protection to all persons appearing before an Indian Court."

The amicus has a substantial interest in the outcome of this litigation. The resolution of the question of the extent of Indian court jurisdiction over non-Indian offenders committing offenses on Indian reservations will fundamentally affect Indian court operations. The purpose of this brief is to provide the court important information about the existence, nature, goals, training and competence of Indian judicial systems, which will demonstrate their capability to handle a wide variety of cases involving both Indian and non-Indian offenders. The legal arguments are fully addressed in other briefs.

This brief is filed pursuant to stipulation consenting to such action, signed by attorneys for all parties and filed with the Clerk of Court in September 1977.

SUMMARY OF ARGUMENT

Amicus curiae National American Indian Court Judges Association urges the Court to affirm the

decision of the federal district court and the court of appeals in Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), and hold that Indian courts have jurisdiction over a non-Indian who commits an offense against the Tribal Criminal Code while on the reservation. Amicus further urges the court to affirm the district court decision in Belgarde v. Morton, No. C 74-683S (W.D. Wash. 1975), that Indian courts have concurrent jurisdiction with state courts, where the state has assumed Public Law 280 jurisdiction, over offenses committed by either Indians or non-Indians while on the reservation.

Amicus believes that the existing law, expressed in treaties, statutes, and court decisions, amply supports affirmance of both lower court decisions. Further, the arguments by petitioners and their amici that Indian courts are neither competent nor equipped to dispense justice and that criminal defendants are denied due process of law in such courts are without basis and are amply refuted by the facts. Indian courts

certainly have been plagued by a paucity of resources and difficulties in retaining the services of well-trained personnel--problems which beset virtually all rural courts. However, during the past decade Indian courts have become better staffed, the judges better trained, and the facilities more adequate.

The Indian Civil Rights Act of 1968, 25 USC § 1301-03 (1970), mandated substantive and procedural protections for persons within tribal jurisdiction and both federal and tribal governments have responded by giving high priority to the improvement of Indian courts. Court needs have been addressed with dramatically increased federal funding from the Bureau of Indian Affairs and the Law Enforcement Assistance Administration (LEAA) of the Department of Justice. The LEAA not only has provided many individual tribes with assistance in improving court facilities, but it has been the principal source of funding for an extensive judicial education program under direction of amicus National American Indian Court Judges Association.

ARGUMENT

I. During this Century, Indian Courts Have Matured into Progressive and Fair Ministers of Justice

After the 1887 Allotment Act, the Bureau of Indian Affairs (BIA) created a number of Courts of Indian Offenses which were considered essentially instrumentalities of the federal government. See United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888); but see, Cohen, Handbook of Federal Indian Law, 148-149 (U.N.M. Reprint 1972). The tribes themselves retained the inherent power to administer justice. Op. Sol. Interior, No. M-27781, 55 I.D. 14 (Oct. 25, 1934). But until federal Indian policy shifted away from assimilation to a greater recognition of the powers of self-government, many Indian courts remained Courts of Indian Offenses. Although the judges were Indians, they were hired and fired by the BIA and the Interior Department prescribed the codes under which they operated.

In the years since 1887 many Indian tribes have determined to establish their own legal systems and their own tribal courts. Residual

tribal sovereignty is the source of authority for these courts. Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). Their specific powers are defined in tribal constitutions and legal codes, adopted by each Indian tribe. In recent years the trend has been for tribes with Courts of Indian Offenses to convert these courts to tribal courts. Of the 133 Indian courts in the country, only 32 are now Courts of Indian Offenses.[1]

This Court has recognized that the authority of Indian courts is an attribute of tribal self-government which must be protected. It has held that such authority extends over non-Indians insofar as on-reservation transactions with Indians. United States v. Mazurie, 419 U.S. 544 (1975); Williams v. Lee, 358 U.S. 217 (1959).

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[1] Even this figure is inflated by the fact that 19 of these Courts of Indian Offenses recently were established with federal assistance to meet the needs of the small and scattered Indian colonies of Nevada which were the subject of a retrocession of jurisdiction from the state to the federal government under 25 USC § 1323 (1970).

A major resurgence in the Indian court system has occurred simultaneously with the federal policy of Indian self-determination of the 1960's and 1970's.[2] One of the important precipitating events in this renewed commitment to the tribal court system has been the passage of the Indian Civil Rights Act of 1968, 25 USC §§ 1301-03 (1970) (ICRA). Until passage of that act, the concepts contained in the Bill of Rights did not apply to actions of tribal courts or tribal governments. Talton v. Mayes, 163 U.S. 376 (1895). The ICRA required Indian tribal governments to afford persons within their jurisdiction most of the same rights they enjoy under the Bill of Rights relative to the federal government

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[2] This Court has acknowledged the impact of the current policy on interpretation of laws enacted in an era less hospitable to tribal self-government. Bryan v. Itasca County, 426 U.S. 373, 388-89, n. 14 (1976).

and, via the Fourteenth Amendment, the state governments.[3]

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[3] The ICRA provides that:

> No Indian tribe in exercising powers of self-government shall--
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
>
> (3) subject any person for the same offense to be twice put in jeopardy;
>
> (4) compel any person in any criminal case to be a witness against himself;
>
> (5) take any private property for a public use without just compensation;
>
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

The first reported case involving the ICRA held that the protections of the act applied to non-Indians as well as Indians. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969). To assure compliance with the ICRA, Congress granted the privilege of the writ of habeas corpus to persons detained by order of a tribe. 25 USC § 1303. In addition, federal courts have taken jurisdiction of suits under 28 USC § 1343(4) to enforce provisions of the act. E.g., Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 (10th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974); Johnson v. Lower Elwha Tribal Community, 484 F.2d 200, 203 (9th Cir. 1973); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 700 (8th Cir. 1972).

> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
>
> (9) pass any bill of attainder or ex post facto law; or
>
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Federal court review has resulted in the development of a substantial body of case law defining the responsibilities of Indian courts under the ICRA.[4] With virtually all Bill of Rights protections assured by federal court enforcement of a congressional enactment, the fears expressed by petitioners and their amici that the tribal judicial process would treat non-Indians unfairly[5] are ill-founded. Two years ago this Court held

[4] Tom v. Sutton, 533 F.2d 1101 (9th Cir. (1976) (right to counsel); Regan v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969) (right to counsel); Low Dog v. Cheyenne River Sioux Tribal Court, Civ. No. 69-210 (D. S.D. 1969) (right to jury trial); In re Pablo, Civ. No. 72-99 (D. Ariz., July 21, 1972) (rights of indigent defendants); Richards v. Pine Ridge Tribal Court, Civ. No. 70-74W (D. S.D., June 30, 1970) (probation revocation); Big Eagle v. Andera, No. 74-1290 (8th Cir., Jan. 8, 1975) (due process--vagueness of criminal statute); Spotted Eagle v. Blackfeet Tribe, 301 F. Supp. 85 (D. Mont. 1969) (adequacy of detention facilities); Wounded Knee v. Andera, 416 F. Supp. 1236 (D. S.D. 1976) (due process--need for prosecutor).

[5] E.g., Brief for Petitioners, pp. 17, 18; Brief for Amicus Curiae Kitsap County, pp. 18, 24.

that non-Indians were subject to the authority of tribal governments delegated by Congress. United States v. Mazurie, 419 U.S. 544 (1975). In so doing the Court rejected an argument that non-Indians would not be afforded the rights of due process and equal protection by the tribe, citing the ICRA. Id. at 558, n. 12.

The responsibilities imposed on Indian courts by the ICRA were not limited to assuring that their own procedures met the requirements of the act. Numerous courts have held that, in challenges to actions of tribal governments, there must be an exhaustion of tribal remedies before a federal court will hear the matter. E.g., Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974); United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973). Obviously, this increases the caseload burden of Indian courts and increases demands for appellate review within the Indian court system. U.S. Department of Justice,

Report of the Task Force on Indian Matters 55 (Oct. 1975).

Recent data collected by the National American Indian Court Judges Association indicates a marked growth in the caseload of Indian courts.[6] For instance, the Jicarilla Apache Tribe of New Mexico had a caseload of approximately 800 in 1975, 1,100 in 1976 and will have 2,000 in 1977 based on the first 40 weeks. The Yakima Indian Nation in Washington had a caseload of 1,200 in 1975, 1,600 in 1976 and projections based on the first 16 weeks of 1977 indicate a caseload of 2,700 this year. Overall, the number of Indian judges has increased in response to growing caseloads. There are currently 217 Indian court judges.

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[6] The data in this paragraph were collected by the NAICJA Long Range Planning Study pursuant to a contract with the Bureau of Indian Affairs (No. K51C14201023).

II. The Federal Government Has Demonstrated an Increasingly Strong Commitment to the Indian Judicial Systems

Indian tribes found it difficult to pay the higher costs of courts caused by increasing caseloads and the requirements of the ICRA. Their problems have been exacerbated by the typical situation on Indian reservations of long distances between courts and the people they serve, a lack of trained personnel to staff courts, inadequate physical facilities, limited availability of social services, and meager financial resources. There is a striking similarity between the problems of courts on the reservation and those of neighboring non-Indian courts in rural areas. See National Center for State Courts, Rural Courts: The Effect of Space and Distance on the Administration of Justice (1977).

Congress has responded to the needs of Indian courts in recent years by providing more financial assistance to tribes for the purpose of supporting Indian courts. This has been consistent with the congressional policy of enhancing tribal self-

government. The following table indicates how federal support through the Bureau of Indian Affairs has risen.

Bureau of Indian Affairs Budget for Indian Law Enforcement & Courts

1968	$ 3,000,000
1969	$ 4,100,000
1970	$ 5,100,000
1971	$ 5,900,000
1972	$ 7,300,000
1973	$ 8,300,000
1974	$11,800,000
1975	$ 9,871,000
1976	$27,500,000
1977	$28,681,000

Prior to 1976 the BIA support program for tribal courts was located in the Law Enforcement Division. In 1976 this responsibility was given higher priority and as a result the BIA established a separate Judicial Services Division. In 1976 and 1977, $3 million was earmarked for Indian courts of a total budget of $27,500,000 and $25,681,000. The avowed purpose of this new administrative unit is to assist the Indian courts to attain greater professionalization, and more independence from law enforcement activities.

Since it began in 1973, the Law Enforcement Assistance Administration also has made

substantial contributions to the support of Indian courts.

Law Enforcement Assistance Administration Support of Indian Courts

1973	$344,783
1974	$403,843
1975	$505,560
1976	$626,676
1977	$497,004 (incomplete)

Notwithstanding the phenomenal growth in government support of Indian courts, significant needs persist. In order to identify these needs and to develop a program of support to address them, the Bureau of Indian Affairs has commissioned the National American Indian Court Judges Association to do a Long-Range Planning Study. The study will result in an analytical assessment of the strengths and weaknesses of Indian courts, model standards for Indian judicial systems and a recommended 5-year plan of program support for the BIA. The BIA intends to test the model standards by implementing them with four model courts and to consider the 5-year plan as an objective for congressional funding in the near future.

III. Indian Court Judges Have Organized to Address Common Needs

In 1968 the Indian court judges themselves realized the additional responsibilities placed on them by the ICRA and thus they formed the National American Indian Court Judges Association (NAICJA).[7] Its purpose was and is to enhance the overall competence of Indian court judges, and to establish a national program of continuing judicial education. Those goals have been carried forward aggressively over the past 9 years as reflected by some of its significant accomplishments.

A program of continuing judicial education has been funded by the Law Enforcements Assistance Administration since its beginning, with funding levels increasing from $60,000 in 1969-1970 to $437,656 for 1976-1977. The BIA has also supported judicial training in Family Law/Child Welfare in the amount of $98,600 in 1973, increasing to $126,845 in 1977. Of the 217 Indian

[7] A copy of the "Indian Courts Newsletter" Vol. 6, No. 1 (1977) has been lodged with the clerk of court.

court judges in the nation, some 111 have participated actively in the program during the past year. All Indian court judges are eligible to participate. The LEAA funding pays for the instruction, the reading materials, and compensates the judges for per diem and travel for attending the training sessions.

Training takes place at four regional sites. Sessions are held for 2 or 2-1/2 days each month for 6 or 7 months of the year. In addition, there are usually 2 national training sessions of 3 days each. It is interesting to note by comparison that the 98 non-lawyer state court judges in the State of Washington received some 1-1/2 days of training for the year 1976. The figures available for the training of non-lawyer state court judges from other states are similar, showing that the training available--and utilized -- by the Indian court judges is far more extensive than that available to, or utilized by, the non-lawyer, state court judges.

The instructional program is carefully designed at the national level each year under the

supervision of lawyers and law professors, reviewed by the NAICJA Board of Directors, and evaluated at the end of the year. Curriculum is developed and training coordinated by a team of instructors including: Robert Bennett, attorney, former Commissioner of Indian Affairs; Stephen Boyden, attorney; George Armstrong, Colorado District Court Judge; and Ralph W. Johnson, Professor of Law at the University of Washington School of Law.

Study materials for the Indian judges have included traditional law texts such as McCormick on Evidence and LaFave and Scott, Criminal Law. In 1975-1976 the NAICJA commissioned the preparation of a special casebook for the training, "Cases and Materials for Indian Court Judges," by Johnson and White, published by the NAICJA.[8] This 476-page casebook covers jurisdictional questions, substantive and procedural law of crimes, and ICRA issues. In addition, the

[8] A copy has been lodged with the clerk.

1976-1977 sessions covered a separate set of case materials prepared by attorney K. I. Perkins on Criminal Procedure. Additional material covered family law and child welfare. The Board of the NAICJA has commissioned another casebook for the 1977-1978 series of training sessions, covering criminal procedure and civil rights issues. This volume is being prepared by K. I. Perkins of the Library of Congress.

In September 1977 the NAICJA sponsored a week-long training session at the National College for the State Judiciary in Reno, Nevada. Eighty-seven Indian court judges attended this session. Instruction covered important aspects of jurisdiction, criminal law and procedure, family law and child welfare.[9]

Since the formation of the NAICJA, the training program has brought the Indian courts a long way toward a more effective judicial system. The NAICJA anticipates that the program will continue

[9] A copy of the final report on the Reno session has been lodged with the clerk.

to provide Indian court judges with a solid working knowledge of criminal law and procedure, civil law and procedure, and specific knowledge of the rights protected by the Indian Civil Rights Act.

Concurrent with the development of the judicial training program, the NAICJA has undertaken to assist Indian courts in a variety of other practical ways through the preparation of several documents that are useful to Indian court operation including:[10]

1. Criminal Court Procedures Benchbook (1976). This is a standard judicial benchbook, and is now used widely by the Indian court judges. The benchbook replaced an earlier, more rudimentary "Criminal Court Procedures Manual" of 1971.

2. Model Indian Court Rules of Criminal Procedure (1977). These rules are patterned after the Federal Rules of Criminal Procedure but have

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[10] Copies of each of the publications listed have been lodged with the clerk.

been modified for Indian court use. The rules are now being considered for adoption either formally or informally by many reservation courts.

3. Model Appellate Procedures Code (1977). This code provides a method by which several Indian tribes can combine their appellate court systems; it is now being contemplated as a possible model for adoption by various groups of Indian tribes throughout the country.

The NAICJA also established in 1976 a highly successful "Court Advisory Program" by which regional instructors, all of whom are lawyers, have been made available to different Indian courts on a one-to-one basis, to visit the tribal courts, observe trials in process, and to provide advice on how the courts can improve their effectiveness and procedures.

CONCLUSION

Indian courts have grown from disciplinary instrumentalities of the federal government to sophisticated judicial tribunals exercising inherent tribal powers of self-government in

Indian country. Persons coming before the courts --whether Indian or non-Indian--are assured by federal law of receiving a fair trial consistent with due process and other protections found in the Bill of Rights. Further assurance that justice will be done is found in the dedication of tribes, Indian court judges and the federal government to strengthening Indian courts through better funding, staffing, facilities and training.

Respectfully submitted,

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